No. 89-612

IN THE

Supreme Court of the United States

October Term, 1989

ROBERTA OTTAVIANI, CAROLEE SCHNEEMANN, JOAN MARIE de la COVA and DOROTHY JESSUP, individually and on behalf of all other persons similarly situated,
Petitioners,

-against-

STATE UNIVERSITY OF NEW YORK AT NEW PALTZ, and CLIFTON R. WHARTON, JR.,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents have failed to show how the five questions presented by petitioners for review to this Court are not appropriate for decision by this Court at this time.

As set forth in the Petition, the

Court below failed to follow the teaching of this Court on issues involved in multiple regression analysis as applied to a Title VII class-action gender discrimination case by female faculty at a state university. This was ignored by the respondents in a brief which makes niggling arguments from alleged facts which were not found to be true, nor relied on by either the trial court nor the court below.

Plaintiffs below showed that gender played a motivating part in decisions with respect to employment of faculty starting with the initial determination of rank and tenure and persisting in decisions as to promotions and salary, presenting evidence that met the threshold rulings by this Court on the issue of Title VII gender discrimination in two modes:

1. Multiple regression analyses which demonstrated, at a level of statistical

significance recognized more than once by decisions of this Court, that gender was a factor in the unequal distribution of rank, salary and promotions;

2. Anecdotal evidence from women faculty, class members and individual plaintiffs which gave vivid instances of discrimination on account of gender against female faculty, members, especially those advocating women's rights, and established the consistent failure of the respondents' so-called affirmative action programs to be effective in adjusting the inequities in salaries that were conceded by the university administration to exist at the beginning of the class period.

I

Conflict with Price Waterhouse v. Hopkins, 490 U.S.___, 104 L.Ed. 2d 268 (1989)

Respondents offered no evidence as required by *Price Waterhouse* that the

defendant would have made the same decision concerning instances where women were unfavorably considered had they not taken gender into account.

Respondents argue that *Price Waterhouse* was "intended to supplement the Title VII analysis in limited cases where a disparate treatment plaintiff produces *direct* evidence that an illegitimate criterion was a substantial factor in the decision." To the contrary that case does not distinguish between direct and circumstantial evidence showing such gender discrimination. This Court has confirmed the validity of multiple regression analysis as effective evidence in a Title VII case. Further, respondents maintain erroneously that *Price Waterhouse* is not applicable to class actions, arguing that if the class had prevailed, they would have prevailed under the doctrine of *Texas*

Department of Community Affairs v.Burdine, 450 U.S. 248 (1981)

This raises the next issue as to the significance of multiple regression analysis statistics. From such evidence plaintiffs in this case made out a prima facie case under the standards set by this Court in a line of cases commencing with *Castenada v. Partida,* 430 U.S. 483 (1977). In their misunderstanding of that holding neither the trial court nor the Court below, nor respondents in their brief in opposition have properly addressed this issue.

II

Statistical Evidence Accepted as Persuasive by the Trial Court Was Disregarded by the Court below in its Misunderstanding of this Court's Rulings on Statistical Proof

Petitioners argued that they had established a prima facie case as to gender discrimination in compensation of female

faculty members from statistical data furnished by defendants and subjected by plaintiffs to regression analyses employing variables accepted by the trial court as "persuasive." These regression analyses showed negative residuals for females to be in the range of two, three and more than four and five standard deviations (A-126). Such outcomes establish that this is *not* a case where the statistical evidence (at least as to Exhibits 888,889, and 890 were concerned) was either "inaccurate or insignificant." (See *Teamsters v. United States*, 431 U.S. 324, 360 (1977).

Petitioners contended in the court below that the trial court had not understood the meaning of "statistical significance," when it spoke of "relatively small disparities, such as one to three standard deviations" and declared that with such proof "a court should be cautious about drawing

an inference of discrimination."*

The affirmance of the trial court ruling and reasoning by the court below is at odds with this Court's rulings on statistical evidence commencing with *Castenada* and continuing through *Bazemore v. Friday*, 478 U.S. 385 (1986), and with the other Circuit Courts of Appeal which have addressed the issue of the compelling persuasiveness of multiple regression analysis where the variables chosen are valid and the results demonstrate significant disparities between a protected group and the group to which it is compared. (See Pet. p.20).

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* The error of this statement is two-fold. It shows how the court misunderstood the nature of statistical significance (the differences increase exponentially between 1, 2 and 3 etc. standard deviations) and as applied to the facts of the present case, there was never a contention that one standard deviation was significant.

Respondents sought solace in the holding in *E.E.O.C. v. Sears,* 839 F. 2d 302, p. 323, n. 20 (7th Cir. 1988) where the Court of Appeals suggested that three standard deviations is a minimum cut-off point for statistical significance. It is submitted here that that case stands alone in this holding and further the real holding of the case is to be found in Judge Catlet's dissent at p. 366 in speaking of that case being "tainted in its origins" because "it was tried without recourse to flesh and blood victims." Contrary to the case below which had over 20 anecdotal witnesses, there were none in the *Sears* case. In addition, on the statistical issue, the reference to three standard deviations as a minimum standard is at variance with other courts, and is dicta only since the court found the plaintiffs' statistics otherwise flawed (See p. 349).

III

The Standard this Court Set in Bazemore Concerning the Requirement that an Employer Equalize Employment Conditions as Soon as the Civil Rights Act Applies to its Employees Was Misunderstood and Ignored Below

Petitioners had established through the lips of the defendant's administrators that a report of a Committee on the Status of Women was delivered to the University President in 1974 establishing that 32 women faculty had claimed salary inequities of $1000 or more. The President approved the report and thought it the appropriate basis for making salary adjustments which were *never* made. (Pl. Exh. 126, T. 3308, 3464). The trial court found that the procedure of respondents for identifying salary inequities "from 1973 to 1984 were flawed, improperly applied or non-existent" (A-61). Thus on the anecdotal side, the only conclusion that can reasonably be drawn from the record is that

the pre-Act *Bazemore* inequities accepted as existing by the New Paltz administration, were never addressed or remedied.

Petitioners' robust statistics establishing salary inequities (as well as rank and promotion inequities) included in all of their regression runs the calculating of variables which reflected the employment history of faculty members, including facts about them prior to 1972 when the Civil Rights Act became applicable to universities. In 1973 faculty hired prior to 1972 comprised 94 per cent of the faculty and even at the end of the class period in 1985, the pre-1972 hires comprised 69 per cent of the faculty (SE 342x). The respondent, on the other hand, offered no statistics or proof on this issue (pre-1972 status and salary levels) except for two exhibits which the trial court found to contain too little

information (A-47). The trial court did note, however, without realizing its significance, that none of the defendant's statistical studies accounted for "the residual of any pre-1973 discrimination." (A-53).

The trial court as affirmed by the court below, demonstrated egregious ignorance of the significance of the pre-1972 salary inequities in its rulings on evidence when it excluded an exhibit (Pl. 990) because it included criteria reflecting on persons hired before 1972 (T. 2900-2902). Respondent's footnote on page 21 of its brief is opaque and factually misleading. Exhibit 990 was a window into the hiring practices at New Paltz. It showed that women and men without a Ph.D. or prior teaching experience were hired disproportionately into different ranks, both before and after 1972. Men were hired, in the

main as assistant professors and women were hired as instructors. This set the foundation for showing from other evidence adduced from the defendant's administrators that persons who started at lower ranks and lower salaries continued to stay behind those hired at higher ranks and salaries (T. 672).

IV

The Issue of Discrimination against Female Faculty as to Rank in Initial Placement and Resulting Subsequent Inequities Was Demonstrated Below in Various Statistical Exhibits; This Issue, and How it Should be Proven is Ripe for Decision by this Court

Fulfilling their burden of persuasion, plaintiffs below demonstrated that using rank as a variable in seeking an accurate finding on gender discrimination in a university faculty, "double-counts" (i.e. reduces the weight of the gender variable) since the same entity makes both the salary determination and makes the determination

as to the rank of the faculty member.

A statistical table (Exh. 1021) showed that by subtracting the residual or the effect of being female attributable to rank as an independent variable, from the larger residual, one could determine the effect of rank on the result. The difference between this residual and zero in each year of the class liability period exceeded by two standard deviations, and more, showing that differences in the rank of men and women on the faculty had to be attributed to discrimination on account of gender. Yet the trial court and the court below dismissed these statistics as "mere compilations of data." (A-23,A-48) That, of course, is all one can expect a multiple regression analysis table to be. Nonetheless this Court has stated that such compilations of data -- to wit, multiple regression tables indicating statistically significant

differences between groups of persons -- can provide the proof a plaintiff must produce in a Title VII discrimination case. See *Castenada, Bazemore, etc.*

V

Petitioners' Entitlement to a Judgment as to Liability where Respondents Applied Subjective Standards to Decisions Involving Faculty, their Salary Levels, their Rank and Promotions

Respondents did not acknowledge petitioner's fifth "Reason for Granting the Writ" which was based on the holding in the recent case, *Watson v. Fort Worth Bank and Trust*, 487 U.S. ___, 108 S. Ct. 2777, 101 L.Ed. 2d 827 (1988).

The factors to be considered as criteria for promotion, tenure or salary increase were five subjective standards, as set forth in the Petition, p. 28. The record was replete with subjective determinations and opinions submitted by respondent at trial about the entire class of women suing

as well as the individual plaintiffs. At the conclusion of the case the trial court ruled that on these criteria (A-89), "New Paltz did not intend to discriminate against women" (A-62). This ruling was affirmed below (A-3). Most of the discussion concerning the evidence throughout the trial court's opinion concerned the evaluation of this subjective evidence, and that court's opinion that the evidence did not prove intentional discrimination against female faculty. If the court had evaluated the evidence initially under appropriate standards, it would have had to find that the robust statistical findings supported proof of a prima facie case of discrimination as to gender. Thus the proof adduced was sufficient for a finding of liability on a disparate impact theory.

This issue in a class action case is again one which is ripe for adjudication by

this Court.

CONCLUSION

This Court should grant the petition for a Writ of Certiorari and set the case down for briefing and oral argument.

Respectfully submitted,

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